IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COTTMAN TRANSMISSION SYSTEMS,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
	:	
v.	**:**	
	:	
KEVIN MCENEANY, ET AL.,	**:**	**NO. 05-6768**
Defendants	**:**	

MEMORANDUM AND ORDER

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE **January 19, 2007**

Plaintiff Cottman Transmission Systems, LLC ("Cottman"), a franchisor of transmission repair businesses, seeks damages from defendants Kevin McEneany and Wendyco, Inc.,[1] franchisees, alleging breach of contract and default of a promissory note. Defendants filed an answer, affirmative defenses, and counterclaims against Cottman. The counterclaims allege breach of contract, breach of the covenant of good faith and fair dealing, breach of the implied duty to cooperate/hindrance of performance, fraudulent misrepresentation, negligent misrepresentation, and fraud as to the financing, equipment, and lease. Cottman now moves for summary judgment on defendants' counterclaims. For the reasons outlined below, the motion for summary judgment is granted in part and denied in part.

I. BACKGROUND

This case involves a commercial contract dispute between Cottman and McEneany. In January, 2005, McEneany notified Cottman he was interested in a Cottman franchise. (Pl. Br. 3).

[1] McEneany also operated through Wendyco, Inc., a company John Hanzel, his attorney, helped to incorporate.

As part of his application for a franchise, McEneany gave Cottman a copy of his resume and answers to a questionnaire. (McPeak Affidavit). McEneany advised Cottman he was a builder/general contractor and owner of a company called Kevin J. McEneany Construction. (Pl. Ex. 3). After discussions with Matt Amici, a Cottman representative, and a visit to the site, McEneany settled on an existing Cottman franchise in Charlotte, North Carolina (the "Center"). (Def. Br. 6). On February 21, 2005, Cottman sent McEneany a Uniform Franchise Offering Circular ("UFOC") and a copy of a license agreement. (McPeak Affidavit; Def. Br. 6).

On February 28, 2005, McEneany sent Cottman a check for $19,500 and an offer to purchase the franchise for the sum of $125,000. The offer included three contingencies related to the availability of sufficient financing, transfer of the lease to the Center, and the inclusion of certain equipment in the purchase price. (Pl. Br. 4; Def. Br. 7). Cottman contends it did not agree to the contingencies, but invited McEneany to attend a three-week training class and to negotiate the contingencies at Cottman's home office in Pennsylvania . (Pl. Br. 4). McEneany asserts that when he began attending the Cottman training, he assumed he had a deal based on the terms of the offer to purchase and the requested contingencies. (Def. Br. 8). It appears, however, that McEneany knew the offer to purchase had not been executed and that there was no agreement of sale at least as of March 21, 2005, the date of McEneany's compliance interview.[2]

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[2] On March 21, 2005, Kate McPeak, Cottman's licensing coordinator, interviewed McEneany to ensure Cottman's compliance with state and federal regulations regarding the sale of the franchise. (Pl. Br. 5). During the interview, McEneany was questioned as follows:

> McPeak: What are the terms of your purchase? . . .
> McEneany: Well I'm looking for available fundings, sufficient funding. . . . The transfer of the lease and the lease has to be good on the property. . . . And make sure I get the proper equipment to run another business sufficiently.
> McPeak: Correct and the sales price is $125,000. Correct?

(Pl. Ex. 3).

On March 7, 2005, McEneany began attending Cottman's training class. (Def. Br. 8). On March 9, 2005, Cottman deposited McEneany's $19,500 check. (Pl. Br. 4, Def. Br. 8). During training, McEneany met with several Cottman representatives and discussed financing, the Center lease, and other issues. (Def. Br. 9-10; Pl. Br. 4). During the compliance interview on

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> McEneany: Correct.
> McPeak. Did anyone who spoke with you regarding entry into a Cottman License Agreement provide for you any actual, average or projected sales figures, earning figures or income statements other than the information listed in your Offering Circular?
> McEneany: No they did not.
> McPeak: Okay. Were any promises or assurances made to you regarding Cottman assisting you in obtaining financing other than those representations set forth in the Offering Circular you received?
> McEneany: No.
> McPeak: Were any promises or assurances made to you by a Cottman representative that Cottman would provide financing for you?
> McEneany: No.
> McPeak: Were any promises or assurances made to you by a Cottman representative regarding your ability to obtain financing?
> McEneany: No. . . .
> McPeak: As of this date, has a Cottman representative made any representations to you other than those in the Offering Circular, the License Agreement or related contracts?
> McEneany: No. . . .
> McPeak: Well, you have not executed the License Agreement, correct?
> McEneany: No.
> McPeak: And the purchase agreement has not been executed, we have this offer to purchase.
> McEneany: Right. . . . We're still checking it out.
> McPeak: You're still checking it out.
> McEneany: Still needs some cleaning up.
> McPeak: Okay, so that wouldn't really apply to you because you don't have an agreement of sale yet.
> McEneany: Right.
> (Pl. Ex. 3).

March 21, 2005 McEneany said he had had his attorney, John Hanzel, review the offering circular and license agreement. (Ex. 3, p.2; Dep. 112-13).

On April 19, 2005, McPeak sent McEneany a closing package containing an agreement of sale and purchase, including an equipment list, a demand note, and a license agreement. (Pl. Br. 8; Def. Br. 11). The demand note provided McEneany a loan of $96,000, payable to Cottman "upon third party financing or July 1, 2005" whichever occurred first. (Pl. Ex. 3.8; Pl. Br. 8; Def. Br. 11). The cover letter included in the closing package requested McEneany sign and return the agreements along with a check for $9,500. (Pl. Ex. 3.6). There were further discussions between McEneany and Cottman regarding the equipment list. Cottman sent McEneany a revised equipment list, which McEneany initialled and returned to Cottman along with signed copies of the agreement of sale and purchase, the demand note, and license agreement. (Pl. Ex. 3.10; Pl. Br. 8; Def. Br. 11). On May 2, 2005, McEneany began operating the Center. In January, 2006, McEneany closed the Center.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). I must resolve all justifiable inferences in the non-moving party's favor. Sommer v. The Vanguard Group, 461 F.3d 397, 403 (3d Cir. 2006). The moving party bears the burden of showing the record reveals no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party must go beyond the pleadings to set forth specific

facts showing that there is a genuine issue for trial. Id. However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts;" it must produce competent evidence supporting opposition. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). I may not consider evidence on a motion for summary judgment that would not be admissible at trial. Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 387 n.13 (3d Cir. 1999).

To defeat a motion for summary judgment, factual disputes must be both material and genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "material" if it is predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying law. Id. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving parties. Id. at 248-49. Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, if there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, summary judgment must be awarded to the moving party. Anderson, 477 U.S. at 250.

Pursuant to section 29 of the License Agreement, "any matter whatsoever which arises out of or is connected in any way with the Agreement or the franchise shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania." Therefore, I must apply Pennsylvania substantive law.

III. DISCUSSION

Admissibility of Compliance Tape Recording

Defendants claim Cottman failed to establish the tape recording would be admissible at trial under United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975). The defendants argue Cottman has failed to show the recording device was capable of taping the conversation; the operator of the device was competent to operate the device; the recording is authentic and correct; no changes, additions, or deletions have been made to the recording; the recording has been preserved in a manner shown to the court; the speakers are identified; and the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

No Starks hearing on the tape, however, is needed. Based on the affidavits submitted, the tape meets the Federal Rule of Evidence 104(b) test of admissibility. See United States v. Davis, 2006 WL 2854238 *2 (W.D. Pa. Oct. 4, 2006) (Gibson, J.) (citing United States v. Reilly, 33 F.3d 1396, 1404 (3d Cir. 1994)). Only a prima facie showing of authenticity is required under Rule 104(b). See Reilly, 33 F.3d at 1404. Moreover, the defendants do not present a "colorable attack" as to the authenticity or accuracy of the tape that would shift the burden to Cottman to prove the tape's chain of custody. See Stark, 515 F.2d at 122. Nor do the defendants identify any discrepancy between the tape and the transcript.

In any event, the Starks decision was issued before the adoption of Federal Rule of Evidence 901(a). United States v. Stillis, 2006 WL 1737496 *2 (E.D. Pa. June 22, 2006) (DuBois, J.). Rule 901(a), which governs authentication of evidence, provides the requirement of authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." In other words, Cottman need only show the tape is an

accurate portrayal of the recorded compliance interview. See Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 996 (E.D. Pa. 1997) (Brody, J.). It would then be up to the fact finder to determine whether the recording is authentic. Id. Based on the affidavits submitted, Cottman has shown the tape is an accurate portrayal of the recorded compliance interview between its licensing coordinator, Kate McPeak, and McEneany.

Gist of the Action

Cottman argues that defendants' counterclaims as to breach of the implied duty to cooperate/hindrance of performance (Count III), fraudulent misrepresentation (Count IV), negligent misrepresentation (Count V), and fraud as to the financing, equipment, and lease (Counts VI, VII, and VIII) are barred by the "gist of the action" doctrine.[3] Cottman argues these claims directly relate to the agreement of sale and purchase and the license agreement. Accordingly, Cottman alleges, they are intertwined with defendants' breach of contract counterclaim (Count I), and the gist of the action doctrine bars defendants from bringing these claims as tort claims. Defendants maintain their claims allege fraudulent inducement, which is not precluded under the gist of the action doctrine. They argue Cottman fraudulently induced McEneany to enter the agreement with Cottman by making misrepresentations regarding the profitability of the franchise and misrepresentations that it would obtain "permanent" financing for McEneany. (Def. Br. 26).

The gist of the action doctrine bars tort claims arising "(1) solely from a contract between

[3] "Although the Pennsylvania Supreme court has not yet adopted the gist of the action doctrine, both the Pennsylvania Superior Court and a number of United States District Courts have predicted that it will." Sunburst Paper, LLC v. Keating Fibre Int'l, Inc., 2006 WL 3097771 *2 n.2 (E.D. Pa. Oct. 30, 2006) (Padova, J.).

the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract." Sunburst Paper, LLC v. Keating Fibre Int'l, Inc., 2006 WL 3097771 *2 (E.D. Pa. Oct. 30, 2006) (Padova, J.). The doctrine "is applied to maintain the conceptual distinction between the theories of breach of contract and tort by preventing a plaintiff from recasting ordinary breach of contract claims as tort claims." Id. When it is alleged that a tort was committed in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the "gist" of it sounds in contract or tort. Id. (citing Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999)). The court must determine the source of the duties allegedly breached. Sunburst Paper, 2006 WL 3097771 *2 (citing Werner Kammann Maschinenfabrik, GmbH v. Max Levy Autograph, Inc., 2002 WL 126634, *6 (E.D. Pa. Jan. 31, 2002)).

A claim should be limited to breach of contract when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied in the law of torts. GNC Franchising, Inc. v. O'Brien, 443 F. Supp. 2d 737, 745 (W.D. Pa. 2006) (Lancaster, C.J.). If the duties are intertwined with contractual obligations, the claim sounds in contract. Sunburst Paper, 2006 WL 3097771 *2. If the contract is collateral to conduct that is primarily tortious, it is a tort claim. Sunquest, 40 F. Supp. 2d at 651. Although under Pennsylvania law the gist of the action doctrine may not apply to claims of fraud in the inducement, Pennsylvania courts have held that the doctrine "unquestionably applies" to fraud in the performance of a contract. Advanced Tubular Products, Inc. v. Solar Atmospheres, Inc., 149 Fed. Appx. 81, 85 (3d Cir.

2005); Sunburst Paper, 2006 WL 3097771 *3.

Counts III through VIII of defendants' counterclaims allege Cottman failed to carry out its obligations under the agreement of sale and purchase and the license agreement. Defendants claim Cottman hindered McEneany's performance of his contractual obligations; fraudulently and negligently made misrepresentations with regard to material terms of the agreements; fraudulently led McEneany to believe that purchase of the franchise would be contingent on Cottman finding adequate financing for McEneany; fraudulently promised Cottman would provide certain equipment to McEneany as part of the purchase; and fraudulently promised it would provide a certain form of lease agreement.

Section 5 of the license agreement, entitled "Services rendered by Cottman," lists Cottman's obligations:

> Cottman agrees to:
> a. assist Operator in obtaining a location and negotiating a lease;
> b. assist Operator with the layout of the Center and the installation of equipment;
> c. assist Operator in finding and evaluating personnel;
> d. furnish to Operator the Operator's Manual described in section 6, parts catalogs, and instructional and training materials for the purpose of providing guidance in the methods, procedures and techniques of operating a Center;
> e. furnish from time to time such business information and literature as Cottman determines may be helpful in improving the operations of the Center;
> f. advise and consult with Operator during normal business hours on matters relating to all operations of the Center;
> g. advise Operator of new developments and improvements in the System and to offer to Operator services, facilities, rights and privileges substantially similar to those generally offered to other licensed participants in the System;
> h. provide initial training and additional training programs and meetings; and
> i. continue to develop, promote and protect the good will and reputation associated with the Cottman names and marks and other distinguishing aspects of the System.

(Pl. Ex. 3.15).

Section 3.1.e. of the agreement of sale and purchase sets forth Cottman's obligations with respect to the lease agreement:

> As a condition precedent to closing, Seller agrees to assist Buyer in securing a lease for the premises, terms, and conditions of which will be reasonably acceptable to Buyer. Buyer agrees to execute Cottman's then current form of Lease Rider. Buyer acknowledges that he will be required to execute the Lease in his individual capacity.

(Pl. Ex. 3.14).

Finally, section 3.1.i. of the agreement of sale and purchase establishes Cottman's duties as to what equipment will be provided:

> All Center equipment as listed on Exhibit A [the equipment list] will be in good working order within thirty (30) days subsequent to Closing.

(Pl. Ex. 3.14).

In alleging fraudulent inducement, defendants argue only that Cottman fraudulently induced McEneany to enter into an agreement with Cottman by making misrepresentations regarding the profitability and financing of the franchise. As to the remaining claims, defendants fail to demonstrate how the claims are collateral to the contract and fall outside the gist of the action doctrine. Aside from defendants' claims of fraud as to the financing and misrepresentations of profitability, each allegation addresses some term in the agreement of sale and purchase or the license agreement. Moreover, these claims duplicate defendants' breach of contract claim. Defendants' breach of contract claim cannot be "'bootstrapped' into a fraud claim merely by adding the words 'fraudulently induced.'" See Galdieri v. Monsanto Company, 245 F. Supp. 2d 636, 651 (E.D. Pa. 2002) (Schiller, J.) (citing Pinkert v. John J. Olivieri, P.A., 2001 WL 641737 *5 (D. Del. May 24, 2001)). Therefore, I grant summary judgment as to

defendants' claims of breach of the implied duty to cooperate/hindrance of performance (Count III), fraudulent misrepresentation of material terms of the license agreement (Count IV), negligent misrepresentation (Count V), and fraud as to the equipment and lease (Counts VII and VIII) because these claims are barred by the "gist of the action" doctrine.

Summary judgment based on the gist of the action doctrine is denied on defendants' claims of fraudulent misrepresentation as to profitability of the Center (included in count IV) and fraud as to the financing (count VI). Although section 27 of the license agreement, entitled "risk of operations," defines Cottman's obligations as to representations of profitability by expressly disclaiming any such obligation, it cannot be said that any contractual duties flow from this provision. In addition, only section 2 of the agreement of sale and purchase mentions any kind of financing. This provision, however, does not impose any contractual duties upon Cottman. Although these two claims are not barred by the gist of the action doctrine, they are barred by the parol evidence rule.

Parol Evidence Rule

Cottman argues defendants' fraud in the inducement claims must fail because the parol evidence rule precludes the introduction of prior representations to prove fraud in the inducement of fully integrated contracts. Defendants argue that the alleged prior representations of third party financing and profitability of the Center are not covered by the license agreement; thereby rendering any prior representations admissible. Defendants do not allege the parties agreed to include such provisions in the agreement and that these terms were fraudulently omitted.

In Pennsylvania, the parol evidence rule bars consideration of prior representations

concerning matters covered in the written contract, even those alleged to have been made fraudulently, unless the representations were fraudulently omitted from the contract. Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996); Interwave Technology Inc. v. Rockwell Automation, Inc., 2005 WL 3605272 *15 (E.D. Pa. Dec. 30, 2005) (Pratter, J.) ("Parol evidence of representations concerning a subject dealt with in an integrated written agreement and made prior to or contemporaneous with the execution of the agreement should be admitted to modify or avoid the terms of that agreement only where it is alleged that the parties agreed that those representations would be included in the written agreement but were omitted by fraud, accident or mistake."). In Pennsylvania, parol evidence also cannot be used to prove fraudulent inducement. Interwave Technology, 2005 WL 3605272 *15.

Where the assertions made by one party are specifically contradicted in the written agreement, parol evidence is admissible only to prove fraud in the execution, not the inducement, of the contract. Id. at *16. If the defendants relied on any understanding, promises, representations or agreements made prior to the execution of the written contract, they should have protected themselves by incorporating into the written agreement the promises or representations upon which they now rely. See Interwave Technology, 2005 WL 3605272 *16 (quoting 1726 Cherry St. Partnership v. Bell Atlantic Properties, 653 A.2d 663, 666 (Pa. Super. 1995)).

In determining whether any oral representation would be covered by the written agreement, I compare the two and ask whether the provisions in the written agreement would normally and naturally include the oral representation. See Interwave Technology, 2005 WL 3605272 *17. "If they relate to the same subject-matter and are so interrelated that both would

be executed at the same time, and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing." Id. This is a question of law.

Here, defendants allege Cotman made false representations to McEneany that the Center brought in an average of about $20,000 per week and would continue to do so if McEneany purchased the business. Section 27 of the license agreement, entitled "Risk of Operations," specifically covers defendants' allegation and provides as follows:

> Operator recognizes the uncertainties inherent in all business ventures. Operator agrees and acknowledges that, except as specifically set forth in this Agreement, no representations or warranties, express or implied have been made to Operator, either by Cottman or anyone acting on its behalf or purporting to represent it, including, but not limited to, the prospects for successful operations, the level of business or profits that Operator might reasonably expect, the desirability, profitability or expected traffic volume or profit of the Center (whether or not Cottman assisted Operator in the selection of the location of the Center), the costs of equipping or the amount or type of equipment necessary or appropriate to the operation of the Center or as to the quality of any products or services to be sold by Operator to its customers hereunder. Operator acknowledges that all such factors are necessarily dependent upon variables beyond Cottman's control, including without limitation, the ability, motivation and amount and quality of effort expended by Operator.

(Pl. Ex. 3.15).

Defendants do not allege that the parties had agreed to include the center's profitability at $20,000 per week into the agreement nor that it was fraudulently omitted. A fraud in the inducement claim cannot survive when the defendants allege they relied on allegedly fraudulent statements they did not insist be included in the final written contract. See Interwave Technology, 2005 WL 3605272 *18.

As to defendants' claim of fraud as to financing, they maintain Cottman told McEneany that Segal Financial Group ("Segal") would be handling all new Cottman franchisees', including

McEneany's, financing. McEneany met with Segal to arrange financing, but Segal said it could not secure financing for him because the banks it approached did not like the Cottman program. Cottman then told McEneany the only other financing option was equipment lease financing and provided McEneany with loan options from a company called Perfect Capital. On McEneany's behalf, Cottman had provided Perfect Capital with an equipment list to be used as collateral in securing funding from two different banks. One loan was in the amount of approximately $35,000 and the other was in the amount of approximately $75,000. McEneany discovered Cottman was able to secure this funding by representing that the equipment used as collateral was less than three years old and using inflated valuations. Some of the equipment on the list did not exist at the Center. McEneany therefore refused to agree to the proposed financing and did not obtain third party financing. (Def. Br. 13-14). Defendants contend Cottman never intended to find adequate financing.

Section 5 of the license agreement specifically lists Cottman's various obligations to defendants under the agreement, but does not include assisting McEneany with obtaining third party financing. Comparing section 5 of the written agreement and Cottman's alleged promise to assist defendants in finding adequate financing, I conclude the alleged representation would normally and naturally be included the written agreement. See Interwave Technology, 2005 WL 3605272 *17.

In addition, section 2 of the agreement of sale and purchase, entitled "purchase price," mentions the subject of financing, and provides as follows:

> Subject to the terms and conditions of this agreement, buyer shall pay to seller the sum of one hundred twenty five thousand dollars ($125,000) as follows:
> (a) $19,500 Nineteen Thousand Five Hundred Dollars in Earnest Money Deposit to be

held by Cottman.

(b) $9,500 Nine Thousand Five Hundred Dollars in cash or certified funds at Closing;

(c) $96,000 Ninety Six Thousand Dollars in the form of a Demand Note to be executed at Closing payable upon third party funding or July 1, 2005 which ever shall occur first.

(Pl. Ex. 3.14).

Third party funding is mentioned in section 2 of the agreement of sale and purchase, but there is nothing in either of the agreements concerning Cottman providing or assisting in obtaining financing for McEneany even though it would normally or naturally have been included. Defendants also do not allege a financing provision was fraudulently omitted from the agreement. This claim cannot survive when the defendants themselves did not insist the allegedly fraudulent statement be included in the final written agreement.[4] See Interwave Technology, 2005 WL 3605272 *17.

Finally, Pennsylvania law prohibits recovery on a claim of fraud in the inducement where the contract represents a fully integrated written agreement. Id. at *18. Both the license agreement and the agreement of sale and purchase are fully integrated. The license agreement contains the following incorporation clause, contained in section 31:

> This instrument contains the entire agreement of the parties, and supersedes, cancels, and revokes any and all other agreements between the parties relating to the subject matter of this Agreement. There are no representations or warranties, either oral or written, except those contained in this Agreement. Except as set forth in Section 6.c., this Agreement may be modified only by an agreement in writing signed by the party against whom enforcement of such modification is sought.

(Pl. Ex. 3.15).

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[4] During the compliance interview, McEneany responded in the negative when asked: "Were any promises or assurances made to you by a Cottman representative that Cottman would provide financing for you?" (Pl. Ex.3.3).

The agreement of sale and purchase also contains an incorporation clause, in section 11.1 of the agreement, providing:

> This Agreement constitutes the entire agreement of the parties regarding the sale and purchase of the Center and there are no representations or warranties expressed or implied, oral or written, except those specifically set forth herein. This Agreement may be modified or amended only in writing and signed by both parties.

(Pl. Ex. 3.14).

Therefore, I grant summary judgment on defendants' fraud in the inducement claims based on the parol evidence rule.

Breach of Contract Claim

The elements necessary to recover on a claim for breach of contract are well established. A party asserting a breach of contract claim under Pennsylvania law must establish three elements: "(1) the existence of a contract, including its essential terms, (2) breach of a duty imposed by the contract and (3) resultant damages." Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003).

There remain questions of fact which are essential to the determination of what contractual duties were breached and the resultant damages. For example, there are factual disputes both material and genuine as to Cottman's alleged failure to comply with the terms of the license agreement and the offer to purchase, whether the offer to purchase established a contract, Cottman's alleged agreement to provide McEneany with certain equipment, Cottman's alleged failure to assist McEneany with the transfer of the lease for the Center, and other alleged failures to provide McEneany with support in operating the Center. Therefore, Cottman's

summary judgment motion is denied with respect to this claim.

Good Faith and Fair Dealing

Cottman seeks summary judgment on defendants' claim for breach of the covenant of good faith and fair dealing. Cottman argues the duty of good faith and fair dealing does not apply here because there is no fiduciary or confidential relationship nor any claim of unfair termination. Even if the duty could properly be implied, it argues defendants have alleged no facts to overcome the limited scope of the implied duty. Defendants argue that Cottman effectively abandoned McEneany after he took control of the Center by refusing to provide the assistance, support, and equipment necessary to operate the Center.[5] Cottman's abandonment, they allege, forced McEneany to close the Center after nine months of operation. Defendants argue Cottman's conduct constituted a constructive termination of the franchise agreement, which is within the scope of the implied duty. Defendants further argue that Pennsylvania law is not settled on the issue whether the duty of good faith and fair dealing is limited in franchise situations to termination cases.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement." Restatement (Second) of Contracts, § 205. In the franchise context, however, the Pennsylvania Supreme Court has addressed the duty of good faith and fair dealing only in termination situations. See O'Brien, 443 F.Supp.2d at 751-52 (citing Atlantic

[5] Defendants' counterclaims allege, among other things, that Cottman failed to provide support pursuant to the license agreement, essentially abandoning McEneany, and failed to provide "certain" training, which resulted directly in the failure of defendants' business. (Def. Counterclaims 55, 57). These facts are sufficient to allege an indirect termination. See Fed. Rules Civ. Proc. Rule 8.

Richfield Co. v. Razumic, 390 A.2d 736, 740-42 (Pa. 1978) (holding that absent an explicit clause authorizing the franchisor to terminate the franchise for any reason whatsoever, an implied covenant of good faith constrains the decision of a franchisor in terminating a franchise agreement)). In Witmer v. Exxon Corp., 434 A.2d 1222, 1227 (Pa. 1981) the court observed that the Razumic standards of good faith and fair dealing "are applicable only in the context of an attempt on the part of the franchisor to terminate its relationship with the franchisee." Id. at 1227.

Courts are divided on how far the duty of good faith extends. For example, in AAMCO Transmissions, Inc. v. Harris, 759 F. Supp. 1141, 1148-49 (E.D. Pa. 1991) (Pollak, J.), the court predicted that "it seems unlikely that the Pennsylvania appellate courts will limit the franchisor's duty to deal in good faith to situations of franchise termination when the issue is squarely presented." Id. (noting both the breadth of the Restatement language and Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153-54 (Pa. Super. 1989), in which the Pennsylvania Superior Court stated, "a duty of good faith has been imposed upon franchisors in their dealings with franchisees"); accord Bedrock Stone and Stuff, Inc. v. Mfrs. & Traders Trust Co., 2005 WL 1279148 *7 (E.D. Pa. May 25, 2005) (Gardner, J.) (predicting that the Pennsylvania Supreme Court would hold that a duty of good faith and fair dealing is inherent in every contract). In Valencia v. Aloette Cosmetics, Inc., 1995 WL 105498 *2 (E.D. Pa. Mar. 10, 1995) (O'Neill, J.), however, the court held that in light of Witmer's holding, it could not predict the Pennsylvania Supreme Court would expand the implied duty of good faith arising from a franchise agreement to include situations not involving termination of agreement. The court in Bishop v. GNC Franchising LLC, 403 F. Supp. 2d 411 (W.D. Pa. 2005) (Schwab, J.), also

concluded it was "unclear" whether Pennsylvania would recognize a claim that a franchisor's conduct in performing the contract breached the implied covenant of good faith. The court noted that although a handful of Pennsylvania courts have considered the possibility of expanding the good faith duty beyond the termination exception of Razumic, none has yet done so, and declined to extend the scope of the duty in the absence of clear guidance from the Supreme Court of Pennsylvania or the United States Court of Appeals for the Third Circuit.[6] Id.; accord Keshock v. Carousel Systems, Inc., 2005 WL 1198867 *3 (E.D. Pa. May 17, 2005) (Joyner, J.) ("To date . . . Pennsylvania courts have never extended the franchisor's good faith duty beyond the context of termination. . . . Absent some indication from the Pennsylvania Supreme Court that the duty of good faith dealing should be imposed on franchisors in their pre-termination dealings with franchisees, this court cannot find that such a duty exists.").

Although Pennsylvania law is unsettled on the scope of the implied duty of good faith, defendants allege the constructive termination of a franchise relationship would fall within the established limits of the implied duty under Pennsylvania law. For example, the court in Kuligowska v. GNC Franchising, Inc., 2002 WL 32131024 (W.D. Pa. Nov. 25, 2002), denied a motion to dismiss when the franchisees had stated a cognizable claim of indirect termination after a franchisor had "sought to drive" them out of business. Id. at *6-7 (noting in Witmer, 434 A.2d at 1227, the court did not limit good faith standards to situations involving direct terminations of the franchise relationship; rather, the court implied that a claim asserting breach

[6] Bishop v. GNC Franchising LLC, 403 F. Supp. 2d 411 (W.D. Pa. 2005) is pending appeal in the United States Court of Appeals for the Third Circuit. The scope of the implied duty of good faith and fair dealing may be addressed by the Third Circuit on appeal. See Bishop, Civ. Action No. 05-0827, W.D. Pa., Docket Nos. 126-128, Notice of Appeal (USCA Case No. 06-2302).

of the good faith standards could be sustained in an "indirect termination" case as well). The Pennsylvania Supreme Court in Witmer appears to have included indirect termination of franchise relationships within the scope of the implied duty of good faith and fair dealing. See Witmer, 434 A.2d at 1227. Thus, defendants' claim that Cottman breached the implied duty of good faith and fair dealing by constructive termination of the franchise relationship falls within the scope of the duty of good faith under Pennsylvania law.

Moreover, resolution of this claim for breach of the covenant of good faith and fair dealing involves the same facts underlying defendants' breach of contract claim. Thus, I deny Cottman's motion for summary judgment on count II, and will resolve at trial the question whether the covenant of good faith and fair dealing was breached.

IV. CONCLUSION

For the reasons stated above, the motion for summary judgment filed by Cottman is granted in part and denied in part. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COTTMAN TRANSMISSION SYSTEMS,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
	:	
v.	**:**	
	:	
KEVIN MCENEANY, ET AL.,	**:**	**NO. 05-6768**
Defendants	**:**	

ORDER

TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE **January 19, 2007**

And now, this 18th day of January, 2007, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED as to counts III through VIII of defendants' counterclaims;

2. Plaintiff's motion for summary judgment is DENIED as to counts I and II of defendants' counterclaims.

BY THE COURT:

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TIMOTHY R. RICE
U.S. MAGISTRATE JUDGE